TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 435.

CHARLES UGHBANKS, PLAINTIFF IN ERROR,

vs.

A. N. ARMSTRONG, WARDEN OF THE STATE PRISON AT JACKSON, MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED AUGUST 28, 1907.

(20,838.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1907.

1 STATE OF MICHIGAN

Supreme Court

Your petitioner, Charles Ughbanks, respectfully shows unto this Honorable Court as follows

1

That he is now imprisoned and restrained of his liberty by one A. N. Armstrong, Warden of the State Prison at Jackson, Michigan, for a supposed criminal offense, to-wit: the crime of burglary, as appears by a copy of the information filed against your petitioner in the Circuit Court for the County of Washtenaw, hereto attached, marked Exhibit "A"; and that afterwards and on to-wit: the 17th. day of March, 1904, your petitioner was convicted upon his plea of guilty, and sentenced by said Court to be confined in the State Prison at Jackson, Michigan, at hard labor, for a period of one year minimum, and two years maximum, as will also appear by reference to a copy of said commitment and sentence hereto attached and marked Exhibit "B"

2

That your petitioner is not committed or detained by virtue of any process, decree or execution specified in the Eighth Section, Chapter 134 of the Revised Statutes of this State, and the amendments thereto, but according to the best of your petitioner's knowledge and belief, said confinement was by virtue of said commitment.

3

That your petitioner has been confined at hard labor under said commitment and judgment aforesaid, in the aforesaid Michigan State Prison at Jackson, Michigan, for three years and upwards; and that his minimum sentence expired on the 17th day of March, 1905, and his maximum sentence expired on the 17th day of March, 1906, without deducting anything for good time.

2 4.

That your petitioner is a resident of Canada, and has never resided in the State of Michigan or the United States; that he has no acquaintances or friends in said State of Michigan; that by reason of such facts he has been unable to furnish satisfactory evidence that arrangements have been made for his Honorable and useful employment, or that any responsible person, (not a relative) will agree to act as his first friend and adviser, and execute an agreement to employ your petitioner, or use his best efforts to secure suitable employment or furnish a bond, or other satisfactory security for the faithful performance of his agreement as such first friend and adviser, to the Governor or Advisory Board in the Matter of Pardons.

5.

That by the records kept and retained by the Warden of the said Michigan State Prison at Jackson, Michigan, it appears therefrom, as your petitioner is advised, that your petitioner has been twice before convicted of felony, to-wit: that he had served four years in Kingston, Canada, and four years in Jackson, Michigan; that your petitioner at the expiration of his minimum sentence or shortly thereafter made application for parole to the Advisory Board in the Matter of Pardons, and has been informed that said application could not be heard or considered by said Board for the reason that it appeared that your petitioner had been twice before convicted of a felony; and that your petitioner had not furnished any evidence that arrangements had been made for his honorable and useful employment, or that any responsible person (not a relative) had agreed to act as his first friend and adviser, who was willing to execute an agreement to employ your petitioner or use his best efforts to secure such suitable employment, or to execute a bond or other satisfactory security for the faithful performance of his agreement as such first friend and adviser, and that therefore your petitioner was not eligible to parole under the laws of the State of Michigan, and could not be paroled.

6.

That in and by the terms of said sentence and commitment
3 your petitioner was sentenced to be confined in the Michigan State Prison at Jackson, Michigan, at hard labor for not less than one year nor more than two years, but, nevertheless, and notwithstanding the express terms and conditions of said sentence and commitment the said A. N. Armstrong, Warden aforesaid, claims and pretends that your petitioner cannot be released or discharged from such confinement until your petitioner has served the period of five years, the maximum term under the statute under which your petitioner was charged and informed against and convicted; and that your petitioner is not eligible to and cannot make any application for parole, or be heard thereon in his own behalf for the reasons aforesaid.

7.

Your petitioner further shows that he was sentenced under the terms and conditions and provisions of Act # 136 of the Public Acts of 1903, of the State of Michigan; and that he is now restrained of his liberty under Act # 184 of the Public Acts of 1905, of said State, both of which said acts are in violation of the Constitution of the State of Michigan, and the Constitution of the United States and repugnant thereto; and that the sentence imposed upon your petitioner was, and is void by reason thereof; and that your petitioner is now restrained of his liberty without due process of law, and in violation of his constitutional rights as a citizen of Canada and of the United States.

8.

That your petitioner further shows and states that he is advised by his counsel, Nichols & Sheldon, of Ionia, Michigan, to whom he has fully and fairly stated the facts and circumstances of the case, and your petitioner verily believes such advice to be true, that such imprisonment is illegal and in violation of the Constitution of the United States; and that such illegality consists in this to-wit: That said commitment and sentence under which the said A. N. Armstrong, Warden of said State Prison at Jackson, Michigan, now deprives your petitioner of his liberty and restrains and imprisons him is absolutely invalid, void and of no effect, for the following reasons:

(*a*) That Act 136 P. A. 1903, under and by virtue of the terms of which petitioner was sentenced, and Act 184 P. A. 1905, under which petitioner is now restrained of his liberty, were and are invalid, void and of no effect, because said acts are in direct violation of the provisions of Article 6, Sections 27, 28, 31 & 32 of the Constitution of the State of Michigan, and Article 6 of the Constitution of the United States, which provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

And Article 8 which provides:

"Excessive bail shall not be required, nor excessive fines, nor cruel and unusual punishment inflicted."

For the reason that your petitioner is by said acts deprived of the right of a trial by a jury, of being informed of the nature of any accusation against him; of being confronted with witnesses; of having the assistance of counsel; and is subjected thereby to cruel and unusual punishment, and deprived of his liberty without due process of law.

(*b*) That Act 136 P. A. 1903 under and by virtue of the terms of which petitioner was sentenced, and Act 184 P. A. 1905, under the terms of which your petitioner is now restrained of his liberty, are invalid, void and of no effect, because said acts are in direct violation of Article 6, Sections 27, 28, 31 & 32 of the Constitution of the State of Michigan, and of Article 14, Section 1, of the Constitution of the United States, which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, or shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

For the reason that by said sentence and the provisions of said

acts, the privileges and immunities of your petitioner as
5 a citizen of the United States, are abridged and your petitioner is deprived of his liberty, without due process of law, and is denied the equal protection of the law.

(c) That your petitioner was sentenced under the provisions of Act 136 P. A. 1903, which act was repealed June 7, 1905, and is now restrained of his liberty by said A. N. Armstrong, Warder, of said State Prison at Jackson, Michigan, under the provisions of Act 184 P. A. 1905, and said Act 184 is invalid, void and of no effect, because in violation of the provisions of Article 4, Section 43 of the Constitution of the State of Michigan, and Article 1, Section 10 of the Constitution of the United States, for the reason that Act 184 inflicts greater punishment and penalty and requires and demands more of your petitioner and alters his situation, to his disadvantage, from what it was under the law of 1903, under which petitioner was sentenced as aforesaid.

(d) That for the reasons aforesaid your petitioner shows unto this Court that he is now entitled to his liberty; and that said A. N. Armstrong, Warden of said State Prison at Jackson, Michigan, now is, and for a long space of time, to-wit: Since the 17th day of March, 1906, has restrained your petitioner of his liberty and detained him in custody, without any warrent of law or authority therefor.

Wherefore, Your petitioner prays that a writ of *habeas corpus* may be issued out of the Supreme Court of the State of Michigan to inquire into the cause of said imprisonment and detention of your petitioner, and that he may be relieved therefrom, and your petitioner will ever pray etc.,

(Signed) CHARLES UGHBANKS.

GEO. E. NICHOLS,
Attorney for the Petitioner.

STATE OF MICHIGAN, *County of Jackson, ss.*

On this 29th day of May A. D. 1907, personally before me appeared the above named Charles Ughbanks, who made oath that he has heard read the above petition by him subscribed; that he knows the contents thereof; that the same is true of his own knowledge and belief, except as to matters therein stated to be on information and belief, and as to those matters he believes it to be true.

(Signed) GEORGE R. STONE,
[NOTARY'S SEAL.] *Notary Public in and for Said County.*

My commission expires Apr. 29, 1910.

6 EXHIBIT A.

(Copy.)

STATE OF MICHIGAN, *County of Washtenaw*, ss.

The Circuit Court for the County of Washtenaw, the March Term for the Year A. D. 1904.

John L. Duffy, Prosecuting Attorney in and for the County of Washtenaw aforesaid, for and in behalf of the People of the State of Michigan, comes into the said Court in the March term thereof in the year one thousand nine hundred and four, and gives the Court here to understand and be informed that Charles Ughbanks, late of the City of Ann Arbor in the County aforesaid, heretofore to-wit; on the fifteenth day of March, in the year one thousand nine hundred and four, at the Township of Ann Arbor, in the County aforesaid, about the hour of nine o'clock in the night time of said day with force and arms at the Township aforesaid, in the County aforesaid, the out-buildings, to-wit; the hen houses, of one Henry Richards, there situate feloniously and burglariously did break and enter with intent then and there and in said out-buildings to commit the crime of larceny.

7 EXHIBIT B.

(Copy.)

At a General Term of the Circuit Court for the County of Washtenaw, continued and held at the Court House in the City of Ann Arbor, Washtenaw County, on Thursday, the 17th day of March, A. D. 1904.

Present: Hon. E. D. Kinne, Circuit Judge.

The Court, upon proclamation of the Sheriff, under the direction of the Judge thereof, was opened for business in due form.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
CHARLES UGHBANKS.

The respondent in this Cause, having, upon his plea of guilty to the information filed against him in this Court, been duly convicted of the crime of burglary, as appears by the record thereof, and the Court before pronouncing sentence upon such plea, being satisfied after such investigation as was deemed necessary for that purpose, respecting the nature of the case and the circumstances of such plea, that the same was made freely and with full knowledge of the nature of said accusation, and without any undue influence, and having been, on motion of the Prosecuting Attorney, brought to the

bar of the Court for sentence, and having there been asked by the Court if he had anything to say why judgment should not be pronounced against him, and alleging no reason to the contrary,

Therefore, it is ordered and adjudged by the Court now here, that the said Charles Ughbanks be confined in the State Prison at Jackson at hard labor for a period of one year minimum, two years maximum from and including this day.

(Signed) E. D. KINNE,
Circuit Judge.

8 STATE OF MICHIGAN, *County of Washtenaw, ss:*

I, Philip Blum, Clerk of said County, and of the Circuit Court thereof, do hereby certify that the above and foregoing is a true copy of the record of the sentence in the case of the People of the State of Michigan *vs.* Charles Ughbanks in said Court, and the whole of the same as examined and compared by me with the original now on record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court of said County this 17th day of March, A. D. 1904.

[SEAL.] (Signed) PHILIP BLUM, *Clerk.*

9 [Endorsed:] No. 22,326½. State of Michigan. Supreme Court. In the Matter of the Application of Charles Ughbanks for a writ of *habeas corpus*. Petition. Filed June 6, 1907. Chas. C. Hopkins, Clerk. Nichols & Sheldon, Attorneys for Petitioner.

10 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the sixth day of June in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable Aaron V. McAlvay, Chief Justice; William L. Carpenter, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, Associate Justices.

In the Matter of CHARLES UGHBANKS. 22326½.

In this matter a petition is filed for the issuance of a Writ of *Habeas Corpus*, and the Court having duly considered the same and the brief of the petitioner, the Writ is denied.

11 STATE OF MICHIGAN:

Supreme Court.

In the Matter of the Application of GEORGE E. NICHOLS, for and in Behalf of CHARLES UGHBANKS, for Writ of Error to the Supreme Court of the United States.

To said Court:

Your petitioner, George E. Nichols, respectfully shows:

I.

That he is the attorney of Charles Ughbanks, who lately filed an application for writ of *habeas corpus* to inquire into the cause of his detention by A. N. Armstrong, Warden of the State Prison at Jackson, Michigan; that this Court denied a hearing upon such application upon the ground that all questions presented had been heretofore determined adversely to the contention of petitioner, to which application and brief filed in connection therewith, and memorandum handed down by the Court, your petitioner respectfully begs leave to refer.

II.

The petitioner, Charles Ughbanks, claimed in said application for writ of *habeas corpus*, that his constitutional rights under the Constitution of the United States, by reason of his sentence and confinement, were violated in the following specific particulars:

12 (1) That he is being deprived of his liberty without due process of law; that by the provisions of Act 136 P. A. 1903, and Act 184 P. A. 1905, the Warden is authorized to restrain and is now restraining petitioner of his liberty without due process of law.

(See Art. 14 Cont. U. S.)

(2) That he is being denied the equal protection of the law; that by the provisions of Act 136 P. A. 1903, and Act 184 P. A. 1905, he is deprived of the right to make an application for parole, and to parole, and by the provisions of Act 184 by reason of being a resident of Canada and unable to comply with the law, he is not equally protected under the law.

(3) That as a citizen of Canada he is entitled to all the privileges and immunities of a citizen of Michigan; that under and by virtue of Act 184 P. A. 1905, he is denied the same.

(See Sec. 2 Art. 4, Cont. U. S.)

(4) That since his sentence under the provisions of Act 136 P. A. 1903, that act had been expressly repealed, and that he is now restrained of his liberty under the terms of Act 184 P. A. 1905, which imposes a greater burden and materially alters and changes his situation to his disadvantage, and, therefore, said act is *ex post facto* and void.

(See Sec. 10, Art. 1, Cont. U. S.)

13 III.

Your petitioner avers the fact to be and verily believes, that said application for writ of *habeas corpus* so made by said Charles Ughbanks, involved, and there was drawn in question, the validity of the statutes of the State of Michigan upon the ground that said statutes were repugnant to the Constitution of the United States, and that said Supreme Court in its decision found against the rights, privileges and immunities claimed by said Ughbanks, and in favor of the validity of said statutes, and that the effect of said decision of the Supreme Court of this State, is a denial of the right, privilege and immunity claimed by said Ughbanks, under the foregoing articles of the Constitution of the United States, as shown and set forth in said petition for writ of *habeas corpus*.

Wherefore, your petitioner prays that a writ of error may be issued on behalf of said Charles Ughbanks from the Supreme Court of the United States directed to the Supreme Court of the State of Michigan according to the rules and practices in such case.

GEO. E. NICHOLS.

STATE OF MICHIGAN, *County of Ionia, ss:*

On this 3rd day of July A. D. 1907, before me, the undersigned, Notary Public in and for said county, personally appeared George E. Nichols, who made oath he has heard read the foregoing petition, knows the contents thereof; that he verily believes the same to be true.

ANNA E. WELTON,
Notary Public, Ionia Co., Michigan.

My commission expires 2–9–'09.

14 [Endorsed:] 22326½. State of Michigan Supreme Court. In the Matter of the Application of George E. Nichols, for and in behalf of Charles Ughbanks for writ of error to the Supreme Court of the United States. Petition. Filed July 30, 1907. Chas. C. Hopkins, Clerk. George E. Nichols Attorney & Solicitor Morse-Babcock Block, Ionia, Mich.

15 UNITED STATES OF AMERICA, *ss:*

To the Hon. John E. Bird, Attorney General of the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan, wherein Charles Ughbanks is petitioner and appellant, to show cause, if any there be, why judgment rendered against said Charles Ughbanks, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Aaron V. McAlvay, Chief Justice of the Supreme Court of the State of Michigan, this second day of August in the year of our Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of Michigan, Lansing.]

AARON V. McALVAY,
Chief Justice Supreme Court of the State of Michigan.

Service of a copy of the above is hereby accepted.

CHARLES W. McGILL,
Assistant Attorney General, State of Michigan.

Dated Aug. 2nd 1907.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Michigan, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit upon an application of Charles Ughbanks, for the allowance of a Writ of *Habeas Corpus*, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
17 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Charles Ughbanks, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 31st day of July, in the year of our Lord one thousand nine hundred and seven.

[Seal of the U. S. Circuit Court, Southern Division, Western District of Mich.]

CHARLES L. FITCH,
Clerk of the United States Circuit Court for the Western District of Michigan.

Allowed by
AARON V. McALVAY,
Chief Justice of the Supreme Court of the State of Michigan.

18 Supreme Court of the State of Michigan.

In the Matter of the Petition of CHARLES UGHBANKS for a Writ of *Habeas Corpus.*

STATE OF MICHIGAN, *In Supreme Court, ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true copy of the record and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the order of said Court, denying the writ of *Habeas Corpus*, as appears of record and on file in my office; that I have compared the same with the original and it is a true copy of the same and of the whole thereof; that attached thereto are the petition for the writ of error, the writ of error, with allowance endorsed thereon, the citation with admission of service of copy thereof upon the Attorney General of the State of Michigan. I further certify that the said Supreme Court, in denying the petition for a writ of *Habeas Corpus*, did not file any opinion thereon.

In testimony thereof I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing this fifteenth day of August in the year of our Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 20,838. Michigan supreme court. Term No. 435. Charles Ughbanks, plaintiff in error, *vs.* A. N. Armstrong, warden of the State prison at Jackson, Michigan. Filed August 26th, 1907. File No. 20,838.

Office Supreme Court, U.
FILED.
NOV 11 1907
JAMES H. McKENNEY
CLERK

UNITED STATES OF AMERICA

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES

CHARLES UGHBANKS,
Plaintiff in error,

vs.

A. N. ARMSTRONG, Warden of the Michigan State Prison,
Defendant in error.

No. 435.

JOHN B. CHADDOCK,
Attorney for Plaintiff in Error.

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1907

UNITED STATES OF AMERICA

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES

CHARLES UGHBANKS,
Plaintiff in error,

vs.

A. N. ARMSTRONG, Warden of the Michigan State's Prison,
Defendant in error.

No. 435.

Now comes Charles Ughbanks, plaintiff in error, by his counsel and moves the Court to advance said cause upon the docket so that the same may be heard at the October term 1907 of this Honorable Court. The reasons for this motion are as follows:

1st. The Plaintiff in error is confined in the Michigan State's Prison of which the defendant in error is warden and said Plaintiff in error, believing that such imprisonment was illegal, made application to the Supreme Court of the

COPY BLEEDTHRU

State of Michigan for a writ of habeas corpus wherein, among other things charged that his confinement was contrary to certain provisions of the Constitution of the United States. The Supreme Court of the State of Michigan denied said application for writ of Habeas Corpus upon the ground that it had already passed upon and decided the questions involved adversely to the petitioner, the plaintiff in error here.

2nd. Thereupon Plaintiff in error made application to the Honorable Justices of the Supreme Court of the State of Michigan for a writ of error to the Supreme Court of the United States which application was granted and the case has been returned and docketed under the rules of this Honorable Court.

3rd. The case therefore, is a criminal case, in this, that the Plaintiff in error, through the writ of habeas corpus seeks to relieve himself of the sentence pronounced upon him for an alleged violation of the criminal laws of the State of Michigan through the writ of habeas corpus and said writ of error to this Court; that if he is required to await the ordinary course of proceedings in this Honorable Court he will be detained for at least one year longer in prison than he otherwise would be if the hearing of said cause is advanced. Provided of course that he is right in his contention as to the illegality of the sentence under and by virtue of which he is now being confined.

This Honorable Court is, therefore, respectfully requested to advance said cause in the interests of justice and a speedy hearing under the proceedings now pending,

JOHN B. CHADDOCK,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
NOV 21 1907
JAMES H. McKENNEY,
Clerk.

UNITED STATES OF AMERICA

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES

CHARLES UGHBANKS,
Plaintiff in error,

vs.

A. N. ARMSTRONG, Warden of the Michigan State Prison,
Defendant in error.

No. 435.

Brief on Motion to Advance Case.

JOHN B. CHADDOCK,
Attorney for Plaintiff in Error.

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1907

UNITED STATES OF AMERICA

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES

CHARLES UGHBANKS,
Plaintiff in error,

vs.

A. N. ARMSTRONG, Warden of the
Michigan State Prison,
Defendant in error.

Brief on Motion to Advance Case.

STATEMENT OF FACTS.

The motion to advance this case upon the present calendar of the Court that it may be heard at this term is predicated upon the rules and practices of this Court.

(See Rule 26)

Which provides, sub-division 3:

"Criminal cases may be advanced, by leave of the Court on motion of either party."

COPY BLEEDTHRU

The plaintiff in error was ~~convinced~~ convicted of burglary on his plea of guilty in the Circuit Court for the County of Washtenaw, in the State of Michigan.

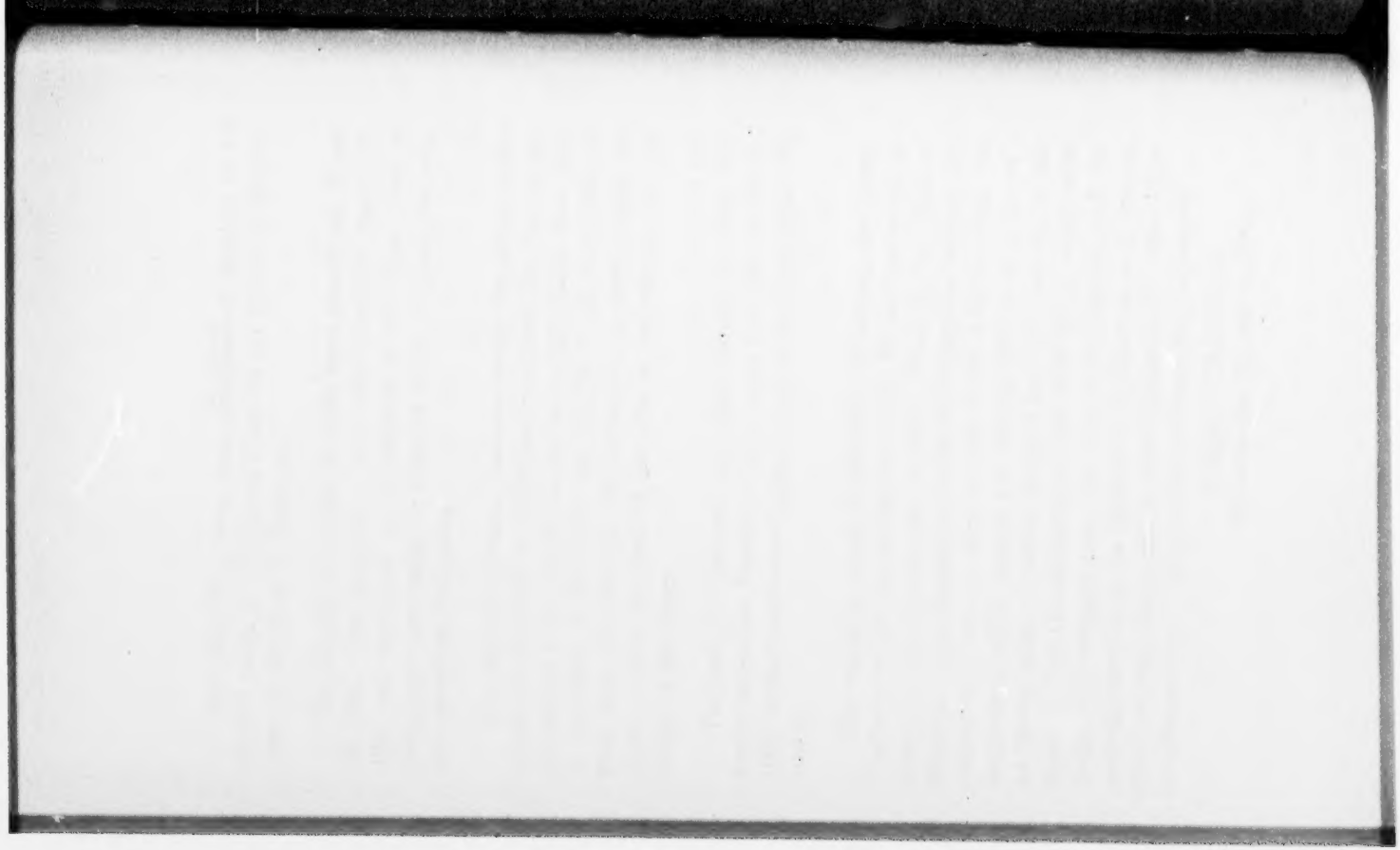
The offense is alleged to have been committed, March 15, 1904. The plaintiff in error was convicted March 17, 1904. and sentenced to be confined in the State prison at Jackson at hard labor for a period of not less than one year, nor more than two years.

The maximum term of sentence under the statute under which the plaintiff in error was convicted for the offense committed is five years, and under Act 136 Public Acts 1903, of the State of Michigan, and Act 184 Public Acts, 1905, of said state, the Warden, the defendant in error, claims the right to hold the plaintiff in error in custody for the full period of five years.

The sentence imposed upon the plaintiff in error will expire under the Warden's claim upon the 17th of March, 1909, without reference to good time, as provided under the statute.

The matter is one of considerable importance and comes, I believe, within the provisions of Rule 26, and inasmuch, as stated in the motion, the Supreme Court of the State of Michigan have deemed it of that importance to warrant the issuing of a writ of error to this Court, I believe that the interests of public justice and the plaintiff in error, as well as the defendant in error, demand an early hearing at the hands of this Honorable Court, and therefore, I would most respectfully request that this motion be granted, and the case advanced upon the calendar to be heard at such time as the Court may designate, or when reached in its order, after its advancement. All of which is respectfully submitted.

JOHN B. CHADDOCK,
Attorney for Plaintiff in Error.



UNITED STATES OF AMERICA

SUPREME COURT

OF THE

UNITED STATES

CHARLES H. UGHBANKS,
Plaintiff in Error,
vs.
A. N. ARMSTRONG, Warden,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

I.

The plaintiff in error filed his petition in the Supreme Court of the State of Michigan, praying for a writ of habeas

corpus, to inquire into the cause of his detention by the defendant in error, who is the warden of the State Prison at Jackson, Michigan, and among other things, it appears from the petition that the plaintiff in error was convicted of the crime of burglary in the Circuit Court for the County of Washtenaw, and State of Michigan, on the 17th day of March, 1904, and was sentenced by said court to be confined in the State Prison at Jackson, Michigan, at hard labor, for the period of one year minimum and two years maximum. (R. 5).

That petitioner (plaintiff in error) has been confined under such sentence more than three years, his minimum sentence having expired March 17, 1905, and his maximum sentence March 17, 1906, that he was a resident of Canada; that he had no acquaintances or friends in the State of Michigan, and by reason of said fact, he was unable to furnish satisfactory evidence that arrangements had been made for his honorable and useful employment, or that any responsible person (not a relative) would agree to act as his first friend and adviser, and execute an agreement to employ him, or furnish a bond or other security for the faithful performance of his agreement as said first friend and adviser to the Governor or Advisory Board in the Matter of Pardons, for the State of Michigan; that by the records kept by the warden, it appears that he had been twice before convicted of felony; that at the expiration of his minimum sentence, he made application for parole but was refused a hearing for the reason and because he had not met the requirements of the statute as to furnishing evidence that arrangements had been made for his honorable and useful employment; and that some responsible person (not a relative) had agreed to act as his first friend and adviser, who was willing to execute an agreement to employ him, or to use his best efforts to secure such suitable employment; and to execute a bond or other security for the faithful performance of his agreement as such first friend and ad-

visers that although he was sentenced to hard labor for not less than one year, nor more than two years, nevertheless, the defendant in error claims that he cannot be released or discharged from such confinement until he has served the period of five years, the maximum term under the statute under which he was charged, informed against and convicted; and that he is not eligible to, and cannot make application for parole, or be heard thereon in his own behalf for the foregoing reasons; that he was sentenced under the terms, conditions and provisions of Act 136, Public Acts 1903, of the State of Michigan, and that he is now being restrained of his liberty under the provisions of Act 184, Public Acts 1905, of said state.

II.

The plaintiff in error also avers in his petition that both of the acts referred to are in violation of the Constitution of the United States and repugnant thereto; and that the sentence imposed upon him was, and is void, and invalid by reason thereof, and that he is restrained of his liberty without due process of law, and in violation of his constitutional rights, and particularly specifies as the grounds for his claim in that regard, that said acts are in violation of the provisions of Articles 6 and 8 of the Constitution of the United States, for the reason that he is by said acts deprived of the right of a trial by a jury, and of being informed of the nature of any accusation against him, of being confronted with witnesses, of having the assistance of counsel, and is subjected thereby to cruel and unusual punishment, and deprived of his liberty without due process of law.

That said acts are in violation of Article 14, Section 1, Constitution of the United States, for the reason that by said sentence and the provisions of said acts, the privileges and

immunities of the plaintiff in error as a citizen of Canada, within the jurisdiction of the United States, are abridged, and he is deprived of his liberty without due process of law, and is denied the equal protection of the law.

That Act 136, Public Acts 1903, was repealed June 7, 1905, and the plaintiff in error is now restrained of his liberty under and by virtue of the provisions of Act 184, Public Acts 1905, which act is invalid, void and of no effect, because in violation of Article 1, Section 10, Constitution of the United States, for the reason that said Act 184 inflicts greater punishment and penalty and requires more of him, and alters his situation to his disadvantage from what it was under the law of 1903, under which he was sentenced.

III.

The Supreme Court of the State of Michigan refused to issue a writ of habeas corpus, or permit a hearing thereon, and in the denial of the petition, handed down a memoranda opinion in which the Court stated that all of the questions presented in the petition had been before that time determined adversely to the contention of petitioner. (R. 6).

Thereupon application was made for a writ of error to this court, which was subsequently allowed by the Justices of the Supreme Court of Michigan, and the case is in this Court for the purpose of review of the questions presented by the petition and adversely ruled upon by the Supreme Court of the State of Michigan.

ARGUMENT.

I.

In 1901, the Constitution of the State of Michigan was amended by the adoption of the following provision:

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"The Legislature may, by law, provide for the 'Indeterminate Sentence Law,' so-called, as punishment for crime on conviction thereof, and for the detention and release of prisoners imprisoned or detained on such sentences."

(Art. 4, Sec. 47 Con'st Michigan as amended).

Under the authority of this constitutional provision, the Legislature proceeded to, and did enact, what is known as Act 136 Public Acts 1903.

Subsequently that act was repealed by Act 184 Public Acts 1905.

Previous to the adoption of the constitutional amendment, a law had been enacted with similar provisions to the acts in question in this case.

(See Act 228 Public Acts 1899, State of Michigan).

This act came under the consideration of the Supreme Court in People vs. Cummings, 88 M., 252, where Chief Justice Morse held the act to be unconstitutional, citing the case of People vs. Moore, 62 M., 497.

Later on in Ellis vs. Circuit Judge, 90 M., 272, the Court again affirmed the unconstitutionality of the act. Therefore, I think it may be accepted without question—that unless the constitutional amendment referred to authorized the enactment of the law, with the provisions of the acts under consideration, both acts would be declared void by the Court of last resort of this state.

It is the contention of the plaintiff in error that Act 136, under which he was sentenced, and Act 184, under and by virtue of which he is now restrained of his liberty, are both unconstitutional, in view of certain provisions of the federal

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constitution to which attention has already been called in the statement of the case.

The Supreme Court of Michigan, however, had occasion to consider the validity of these laws, and has declared the same to be constitutional and valid in their respective provisions.

See People vs. Leonard, 137 M., 457.)

(See In re Campbell, 138 M., 597.)

In this case the question of the constitutionality of the law was raised incidentally, and I quote from the language of Judge Carpenter:

> "Petitioner also urges that, as thus construed, the indeterminate sentence law is unconstitutional, because the 'imposition of a sentence is a judicial act, and the exercise of discretion relative to the term of imprisonment is a judicial function, which under our constitution, can be exercised only by certain specified courts. This argument assails the constitutionality of characteristic and essential features of the indeterminate sentence law. We must hold that the constitutional amendment (see Public Acts 1903, p. 452) which gave the legislature express authority to enact such a law gave it authority to enact a law containing these features."
>
> In re Marion, 140 M., 219.
>
> In re Duff, 141 M., 623.

In re Manaca, 146 M., 697, it was held that the people of Michigan had the right to pass an amendment to the Constitution (Art. 4, Sec. 47) providing for indeterminate sentences, such provision not being within any of the prohibitions

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of the Constitution of the United States; and that said section expressly authorized the indeterminate sentence law, such as Act 136 Public Acts 1903; and that Act 184 Public Acts 1905, repealing, in express terms, Act 136 Public Acts 1903, does not affect sentences already pronounced under the latter act and in process of execution.

In re Cook, 147 M., 127, it was held that the Indeterminate Sentence Law of 1905 (Act 184) providing for sentences in all cases to imprisonment for not less than the minimum, nor more than the maximum term prescribed by statute for punishing the crime, does not provide for any cruel or unusual punishment, and in this case the Court stated, in passing upon the question as to the right to a hearing that:

> "The wisdom of the law which places criminals of such character beyond the power of harm cannot be questioned. Whether the act sufficiently provides for the determination of the question of previous convictions may be doubtful. But, if it were defective in this regard, the whole law could not be held void for that reason."

In re Downs, 147 M., 477, the Court said:

> "The questions raised by petitioner relative to the constitutionality of the Indeterminate Sentence Law have recently been passed upon, and are covered by the decisions of this Court."

Citing The Manaca and Cook cases.

Under these decisions, I think that it may be taken for granted that every question here presented has been passed upon by the Supreme Court of Michigan. Anyway that was the view taken of it by that Court when it denied the application for writ of habeas corpus in this case.

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II.

By the very language of the constitutional amendment, and the resolution which preceded, the Legislature, and the people must have intended to obtain power, through this amendment, to pass indeterminate sentence laws, as such laws are generally understood and accepted.

As I understand the definitions of an indeterminate sentence, it is a sentence ranging from the least period for which the prisoner could be sentenced for the crime of which he is convicted, to the maximum penalty provided by the statute. The object of such sentence is to strip the judiciary of the power to fix the period for which the prisoner shall remain in prison, and vest that power exclusively in the executive, leaving to the judiciary only, the power to name the sentence when imposing judgment, which is merely to inform the prisoner of the least period for which he can be sentenced, and the maximum period that he can be detained, as punishment for the offense for which he stood convicted, according to law.

The power of the Legislature, therefore, to provide a punishment for crime, under this amendment, is limited to an indeterminate sentence, as defined, and the means of carrying it into effect, which must harmonize with the nature of the punishment prescribed by the constitutional provisions authorizing it.

It follows that any statute enacted under this constitutional amendment, which permits the imposition of any punishment, other than an indeterminate sentence, as contemplated thereby, is in violation of the constitutional amendment, and if it violates the provisions, or any of them, of the federal Constitution, to which I shall shortly call attention, the acts are void, and all sentences pronounced under them are invalid, and the party restrained of his liberty thereby is

entitled to his discharge, especially as in this case, if he has served his minimum sentence.

I contend that both acts referred to, not only authorize the imposition of a sentence, which in no sense of the word, can be classed as indeterminate, but the machinery of the law for carrying the sentence into effect, violates the state, as well as the federal Constitution, and deprives the citizen of his liberty without due process of law.

III.

Section 1, Act 136, provides in part:

> "Every sentence to the state prison at Jackson, etc., of any person hereafter convicted of crime, except a person sentenced for life, or a child under fifteen years of age, **shall** be given **an indeterminate sentence.**"

There is no reservation, except as above. Therefore, after the passage of the act, all persons, except those specially mentioned, must receive an indeterminate sentence, the length of which, in the spirit of the amendment, and the understanding of the people who adopted it, must have been, dependent upon good behavior, and the grace of the executive, and the **Constitution makes no discrimination as to persons.**

By the terms of Act 136, Public Acts 1903, Sec. 4, it is provided:

> "No prisoner who has been twice previously convicted of a felony shall be eligible to parole under the provisions of this act."

Act 184, Public Acts, Sec. 5, contains substantially the same provision.

Is it not true that although this plaintiff in error was sentenced as the law required under Act 136, yet he cannot, if the charge against him be true, have any of its benefits or advantages?

It will be remembered that the plaitniff in error was sentenced by the Court to not less than one year, nor more than two years.

The statute provides, and the decisions above cited hold, that the Court has the power to fix the minimum, and the law fixes the maximum.

The words of the act reflect the intent of the Legislature that the benefits provided should be granted, or withheld at the discretion of the trial court, while the amendment to the Constitution certainly contemplated no such thing.

In some instances then, if it appears to the executive, in any manner, that the prisoner has twice before been convicted of a felony, he must be deprived of the benefits and advantages of the law. While, on the other hand, if one man is given not less than four years and six months, or more than five years for the crime of larceny, and another may receive a sentence from six months to five years for the same offense, thereby denying one the right to the benefits, while the other receives all of the benefits provided for under the act, for the first man cannot, under the law, make application for parole until he has served his minimum sentence, which is four years and six months, while the other man, convicted of the same and identical offense, can apply for, and be paroled after six months.

If it is due process of law for the executive to determine and fix the period for which a person convicted of crime shall remain in prison, upon the conduct of the prisoner while in prison, and if such process meets the requirements of the pun-

ishment authorized by the constitutional amendment, providing for an indeterminate sentence in one case, it does in all cases. The opportunity to earn release by good conduct is an essential feature of the Indeterminate Sentence amendment to the Constitution. The power to limit and abridge this opportunity in either case implies the right to deny it entirely. To withhold in one case what has been granted as right in other and similar cases, is unjust and a grievous discrimination, contrary to Section 1, 14th Amendment to the Constitution of the United States. If all persons must be sentenced under the law, then it should apply equally to all.

If the maximum penalty must be uniform in like cases, the same rule must apply to minimum sentences. Equal protection of the law means that its penalties, its immunities and its benefits, shall be applied without discrimination or partiality.

The Legislature has no authority to discriminate against any person, or class of persons, by creating judicial discretion as to whether or not the benefits provided for in the act shall be granted or withheld, and equally true is it, that the Legislature has no power to take from any person, sentenced under the act, its benefits and advantages, without a trial or the right to be heard.

This right to be heard upon the question of parole is a vested right.

(See In The Matter of Canfield, 98 M., 644.)

The plaintiff in error is deprived, without a hearing, of the right to be heard, as to whether in fact he has been twice before convicted of felony; and moreover, this additional punishment falls upon him, and other like offenders, as a punishment for crime committed before, and for which they have satisfied the law and outraged justice.

The act permits this class of prisoners to be sentenced in compliance therewith, but withholds from them the benefits provided for, and makes no provision as to when they shall be discharged.

The act does not require a record of the proceedings, but leaves this question to be determined by the prison officials or Board of Pardons, without a hearing, thereby depriving the prisoner of the right to make a defense against this charge in open Court or in any other way.

In other words, if these acts can be sustained, it means this: That a person charged with crime and convicted is entitled to the benefits of the act, provided (1) That the trial court does not make the minimum sentence equal, or comparatively so, with the maximum fixed by law, and (2) That it does not appear that after his sentence, through hearsay or otherwise, he has been twice before convicted of a felony. On the one hand, if the trial court, in its discretion, shall fix the minimum to the full extent permitted by law, then such offender is entirely deprived of the benefits of parole, and the executive, unless he commutes the sentence, is equally deprived of the right to grant a parole, and moreover, if the Court or Warden, believing that he has obtained information that the offender has been twice before convicted of a felony, and it is so entered upon the records against him, then, by that act, the executive is also excluded from extending to him the benefits of the act.

The plaintiff in error expected that when he received his sentence he would be punished by being confined at hard labor for a period of not less than a year, nor more than two years. He finds, however, that, by virtue of this law, he is to be confined five years, without the right of parole, or of being heard upon that question, and without the authority of any Court, and without notice to him in any way.

If the constitutional amendment contemplated any such condition, then, I submit that the Legislature has no power to submit an amendment to the people, which takes from the citizen his liberty, without due process of law.

In the case of Easton vs. State, 11 Ark. 481, the Constitution was amended by adopting a provision which conferred on Justices of the Peace authority to try, in a summary manner, and without an indictment, one charged with assault and battery, and the Court there held that the bill of rights, or, in other words, the 14th Amendment to the Constitution of the United States, prohibiting the state from passing any law, which deprived the citizen of his liberty, without due process of law, was a limitation of power on the Legislature to propose an amendment of that character; and that any law passed by reason of such authority would be void, as being in violation of the Constitution of the United States.

There is yet another question, which not personally affecting the plaintiff in error, still bears directly on the validity of the whole act.

By Section 5, Act 136, it is also provided:

> "Every such convict while on parole shall remain in the legal custody and under the control and management of the Governor, and shall be subject at any time to be taken back within the enclosure of the prison from which he was permitted to go at large, for any reason satisfactory to the Governor, and at his sole discretion."

The provisions of Act 184, Section 8, differ only from Act 136 in this regard, that the convict is to remain in the legal custody and under the control and management of the warden, subject to be taken back at any time for any reasons satisfactory to the warden.

It will be noticed that no provision is made for any hearing whatever upon this question, and no way pointed out, whereby the questions can be determined.

And in People vs. Moore, 62 M., 496, and in People vs. Cummings, 88 M., 252, the law was condemned and held unconstitutional for that reason.

The question then presents itself, does the constitutional amendment referred to empower the Legislature to take away the right of a hearing in either case?

Apply the law as it stands to this case: Here is a man sent to prison; in some way it is entered upon the records of the prison that he has been twice before convicted of a felony in or out of this state; and upon the strength of this record, he is wholly deprived of the right to a parole and must serve out the maximum sentence provided by law.

Take another man—where he is released, and after his departure from prison, someone reports to the warden that he has violated, in some way, the terms of his parole. A warrant is issued at once, and without a hearing or an opportunity to be heard, he is brought back to prison; he loses all good time, and must serve out his sentence, which may mean to him a long term of years, or even life.

The language of an Illinois judge in considering an act of this character is so much in point, that I cannot refrain from quoting briefly from it. He said:

> "Under the act in question the duration of imprisonment of the offender is not measured by the mitigation or aggravation of the circumstances surrounding the commission of crime, but is to be determined by the subsequent conduct of the convict; that is, whether his subsequent conduct may appeal to the

humanity or arouse the resentment of his keeper. Men in authority are not always blessed with the greatest measure of humanity, and where is the human being who would always remain tractable and docile under the lash of the task-master? Why should a man who breaks and enters a bakery to procure a loaf of bread to appease the hunger of his wife and little ones, be subjected to the same term of punishment meted out to the burglar who breaks and enters a dwelling, in the dead of night? The former haunted with specter of wife and children, left to the cold charity of a heartless world, would probably remain morose and resentful to his keepers during the full term of twenty years, while the latter would become a fawning sycophant, securing the good graces and commendation of those in authority, so as to secure his release after the first year of service. To so construe the law would be repugnant to humanity; would be in direct conflict to the Constitution and contrary to the spirit and genius of our institutions."

29 Chicago Legal News, 176.

The Supreme Court of this state has doubt about its validity.

See In re Cook, i. b.)

IV.

Act 184, Public Acts 1905, Section 14, provides:

"The provisions of this act in so far as they pertain to the paroling of prisoners shall apply to all convicts now serving sentence in any of the said penal institutions whose offenses come under the provisions of this act."

And by Section 17 it is provided:

> "Act 136 of the Public Acts of 1903, and all acts or parts of acts in conflict with the provisions of this act, are hereby repealed."

Therefore, the only right the warden has to hold this petitioner is under the provisions of Act 184 after the repeal of Act 136.

By Section 7 of this act it is provided that:

> "No convict shall be released on parole until the Governor or Advisory Board in the Matter of Pardons shall have satisfactory evidence that arrangements have been made for such honorable and useful employment of the prisoner as he is capable of performing and some responsible person (not a relative) shall agree to act as his first friend and adviser, who shall execute an agreement to employ him or use his best efforts to secure suitable employment for him."

It appears from the petition that the applicant for this writ is a resident of Canada; that he has no friends or acquiantances within the Sttae of Michigan; that by reason of that fact he is wholly unable and will be, to comply with this particular section, and although it may be said that the act treats all persons alike, nevertheless, the result of this provision is to deny the same privileges and immunities as extent to other convicts in this: This petitioner, putting everything else out of the question, may be for every reason entitled to parole, but he has no one outside of prison walls who will agree to employ him or who will give a bond or act as his next friend. The board have no discretion under this act. This evidence must be furnished before the convict shall be released on parole, and we shall call attention to some author-

ity upon this particular provision of the Constitution of the United States, for the purpose of showing that this provision of the law under which this man is now detained is repugnant to the very spirit of the constitutional provision referred to.

In the case of Wolly's Heirs vs. Kennedy, 2 Yerg. 483, the rule is laid down that:

> "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic or land, under similar circumstances. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who made the law, by another, whereas, the like general rule affecting the whole community equally could not have been passed. Special burdens cannot be laid upon any particular class in the community."

And in this case certain individuals named in the statute are prohibited from asserting the right that is given other individuals, namely: to make application for parole, and be heard upon that question; and that right is taken from them without due process of law or any right of hearing thereon.

I very respectfully submit that because of the foregoing, both the act under which plaintiff in error was sentenced, and the act under which he is being detained, are invalid and void for the reason that they plainly violate articles six and eight of the Constitution of the United States, and Section one of the Fourteenth Amendment.

V.

In relation to the claim made that the act under which the plaintiff in error is being detained is unconstitutonal because ex post facto under Secton 10, Article 1, Constitution

of the United States, I have this to urge: Section 14, Act 184, Public Acts 1905, provides:

> "The provisions of this act, in so far as they pertain to the paroling of prisoners, shall apply to all convicts now serving sentence in any of said penal institutions, whose offenses come under the provisions of this act."

Section 17 provides:

> "Act 136, Public Acts 1903, and all acts or parts of acts in conflict with this act, are hereby repealed."

Therefore, it would seem that the only right that the warden has to hold the prisoner is the provisions of Act 184, beyond the minimum term of his sentence.

This question was raised in the Manaca case, 146 M., 704, where Judge Blair held that the rights and obligations of the petitioner must be determined throughout the term of his sentence by the provisions of Act 136, * * * that while Act 184 expressly repeals Act 136, such repeal should not be held to extend to cases like the present where sentence has been regularly pronounced, and was in the due course of execution.

The Court cites in support of the proposition the 26th, Am. & Eng. Enc. of Law, 2nd Ed., pp. 755-6.

An examination of the volume will show that the text reads as follows:

> "Where a statute prescribing the punishment for a crime is repealed after such crime has been committed, but before final judgment of conviction, though after a verdict of guilty, no punishment can be imposed, because the act must be punishable when judgment is demanded, and authority to render judg-

ment must still reside in the Court. But where sentence has been pronounced, and nothing remains but to fix the day when it shall be executed, the case is not affected by the repeal of the law, because the Court in fixing the day of execution does not exercise a judicial power."

And the case cited in support of the text from Alabama was where a man had been convicted of horse stealing; sentenced to death, pardoned upon condition of his submitting to a whipping, leaving the state and never returning, and afterwards being found in the state, was brought before the Court to show cause why death penalty should not be imposed, and the statute in the meantime had been repealed, and the Court held that that did not affect the case.

But in this case under Section 14, the provisions of the act are made specific to apply to all convicts serving sentence in any of the penal institutions.

In repealing Act 136 the Legislature evidently intended to make a provision that all convicts in prison shall thereafter be considered under the provisions of Act 184; and that Act 136 with all its benefits was absolutely taken from them.

I believe that it is useless to cite authority upon the proposition that the Law of 1903 was absolutely and entirely repealed, and no rights reserved under it in any way, nor were they intended to be, and my contention is that if the provisions of the Act of 1905 in any way inflicted greater punishment or penalties or demanded more of the convict, or altered his situation to his disadvantage from what it was under the Law of 1903, it will bring this act within the prohibition of Section 10, Article 10, Constituton United States, providing:

"No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

For the purpose of ascertaining whether, as a matter of law, the Act of 1905 does add to the punishment, or alter the situation of the plaintiff in error, to his disadvantage, I direct the Court's attention to the respective acts for the purpose of seeing, if, as a matter of fact, there is anything added to the Act of 1905 which alters the situation of this plaintiff in error, sentenced under the Law of 1903.

Under Section 5, Act 1903, the convict while on parole was to remain in the legal custody and under the control of the governor, and subject to be taken back for any reason satisfactory to the governor at any time.

Under the Law of 1905, the convict shall remain in the legal custody and under the control and management of the warden or superintendent of the prison from which he has been paroled, and shall be subject to be taken back for any reason satisfactory to the warden or superintendent at any time.

This difference in the law is of great moment to every man in prison, and it comes squarely within the language used in the Moore and Cummings cases, and the right of the convict to be deprived of his liberty now depends not upon the unprejudiced, unbiased and unselfish will of the higher executive of this state, as may well be presumed, and as stated in some of the cases, to be the one man in whom the people would place such great authority, but rather his liberty depends upon the prejudiced and biased will of the man that meets him from day to day, and the language quoted from the Illinois case can be applied to this case at this point with great force.

Again, Section 6, Act 1903, provides:

"When any prisoner violated the conditions of his parole or conditional release is declared a delinquent by resolution adopted and entered in the records of the Board of Control of the institution from which said prisoner was paroled, he shall thereafter be treated as an escaped prisoner owing service to the state, and shall be liable when arrested to serve out the unexpired period of his maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of the time to be served."

Under the Law of 1905, Section 9, it is provided:

"A convict violating the provisions of his parole, and for whose return a warrant has been issued by the warden or superintendent, shall, after the issuance of such warrant, be treated as an escaped prisoner owing service to the state, and shall be liable when arrested to serve out the unexpired portion of his maximum imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of the time to be served."

The difference is this: Under the old law good time could not be taken away from the prisoner for alleged violation of the conditions of his parole until the Board of Control had adopted a resolution and entered the same upon the record. While under the Law of 1905, the convict lost all his good time if he was charged with violation of his parole and a warrant issued for his return. In the one case he could have a hearing; in the other, he could not.

Moreover, a prisoner under the Law of 1903 might be

charged with violation of his parole; the governor orders his arrest and return to prison; six months elapse before his apprehension and then the Board of Control declare him a delinquent after giving him a hearing. Suppose he has five years to serve upon his maximum sentence from the time the charge of delinquency is made, after he is declared a delinquent by the Board of Control, he has four years and six months to serve. In the other case his time stops when a warrant is issued, and he is arrested after six months and declared a delinquent. He has five years to serve, or a difference of six months to his disadvantage.

It necessarily follows that the convict is deprived of the protection of the Board of Control and the right of a hearing, and by the very mandate of the law he loses substantial rights, simply upon the action of the warden in issuing a warrant, which he can do for reasons satisfactory to himself.

The most serious question, and the one that directly affects the plaintiff in error in this case, arises under Section 7, Act 1905, and it is an entire innovation and change from the Law of 1903. It provides:

> "No convict shall be released on parole until the Governor or Advisory Board in the Matter of Pardons shall have satisfactory evidence that arrangements have been made for such honorable and useful employment for the prisoner as he is capable of performing, and some responsible person (not a relative) shall agree to act as his first friend and adviser, who shall execute an agreement to employ the prisoner or use his best efforts to secure suitable employment for him, and such first friend may, in the discretion of the Governor or Advisory Board in the Matter of Pardons, be required to furnish a bond or other satis-

> factory security to the governor for the faithful performance of his obligations as such first friend and adviser."

There is no such provision as this in the Law of 1903. Any prisoner could file his application when his minimum term expired and it was the duty of the warden to forward it to the governor, who referred it to the Advisory Board in the Matter of Pardons, and the governor could act upon it and grant a parole without conditions precedent, so far as the statutory law was concerned, but under this section it was expressly provided:

> "No convict shall be released or paroled until he shall have done the following things: (1) Placed before the Governor or Advisory Board in the Matter of Pardons satisfactory evidence that arrangements had been made for such honorable and useful employment of the prisoner as he is capable of performing; (2) That some responsible person (not a relative) had agreed to act as his first friend and adviser; (3) That such first friend and adviser had executed an agreement to employ him, or use his best efforts to secure suitable employment for him; and (4) That said first friend and adviser stands ready to give a bond, if required, for the faithful performance of his contract."

What is the position of the plaintiff in error who under the facts has no first friend and adviser, and could not obtain one under the former law? If the governor saw fit he could parole him just the same. Under the existing act, until he complies with these conditions precedent the governor cannot act; neither can the Board of Pardons, because he cannot satisfy the requirements of the statute.

Consequently, his hands are tied, where under the Act

of 1903, it was possible for him to have the benefits of parole, his minimum term being served.

Upon this question I cite the following authority:

Ex Parte Medley, 134 U. S., 164.
In the Matter of Canfield, 98 M., 644.
Murphy vs. Com. 52 N. E. R., 505.
In re Murphy, 87 Fed., 549.
Cring vs. State, 107 U. S., 221.
State vs. Tyree, 77 Pac. Rep., 290.

If I am correct in my contention that the Law of 1905, is unconstitutional in any of the features stated, inasmuch as the plaintiff in error has served, not only his minimum but maximum term under the ruling in the Lambrecht case, he is entitled to his discharge if it be held that the Act of 1903 was repealed.

See also Ex Parte Medley, i. b.
Hartong vs. People, 25 N. Y. 9.

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Office Supreme Court, U.
FILED.
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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 435.

CHARLES UGHBANKS,
Plaintiff in Error,
vs.
A. N. ARMSTRONG, WARDEN OF THE STATE PRISON AT JACKSON, MICHIGAN.

BRIEF OF THE ATTORNEY GENERAL OF MICHIGAN FOR DEFENDANT IN ERROR.

JOHN E. BIRD,
Attorney General of Michigan.

No. 20838.

SUPREME COURT OF THE UNITED STATES.

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v
A. N. ARMSTRONG, WARDEN OF THE STATE PRISON AT JACKSON, MICHIGAN.

BRIEF OF THE ATTORNEY GENERAL OF MICHIGAN FOR DEFENDANT IN ERROR.

I.

Michigan Indeterminate sentence laws and decisions of the Supreme Court relating thereto.

An indeterminate sentence law was first enacted in Michigan in 1889. (Act No. 228, P. A. of 1889.) This act was before the Supreme Court in the case of

People v. Cummings, 88 Mich. 249,

when a majority of the court (Justice Grant dissenting) held it unconstitutional, for the reason that it conferred judicial power upon the Board of Control of the prison and the Governor, and infringed upon the power of the Governor under

the constitution to grant pardons, reprieves and commutations. The decision of the court in this case established the law in this state that it was beyond the power of the Legislature to enact an indeterminate sentence law without an amendment to the constitution.

In 1901 the Legislature submitted to the people an amendment to the constitution authorizing the enactment of laws providing for indeterminate sentences, which amendment was adopted by the people at the November election in 1902. The amendment is as follows:

> "The Legislature may, by law, provide for the indeterminate sentences, so-called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences."

Section 47, Art. 4, P. A. 1903, p. 452.

Pursuant to the authority granted by this amendment, the Legislature, in 1903, enacted an indeterminate sentence law (Act 136, P. A. 1903). This act was before the Supreme Court of the state in the case of

In re Campbell, 138 Mich., 597,

where it was held that under its provisions the trial court was neither authorized nor required to fix a maximum term of imprisonment where the maximum term of imprisonment for the crime was fixed by statute at a definite number of years. In other words, that every sentence was to be construed as a sentence for the maximum term prescribed by law as punishment for the crime of which the person sentenced is convicted. It was also urged in that case that the indeterminate sentence law as thus construed was unconstitutional because the imposition of a sentence is a judicial act and the exercise of discretion relative to the term of im-

prisonment, a judicial function which, under the constitution, could be exercised only by certain specified courts. The court said of this contention:

> "This argument assails the constitutionality of characteristic and essential features of the indeterminate sentence law. We must hold that the constitutional amendment (See P. A. 1903, p. 452), which gave the Legislature express authority to enact such a law, gave it authority to enact a law containing these features."

In the case of—

In re Duff, 141 Mich. 623,

petitioner was sentenced by the trial judge under the indeterminate sentence law of 1903 to a minimum term of six months and a maximum term of fifteen months. The statute fixed the maximum punishment for the crime for which he was convicted at imprisonment not exceeding five years. It was there held that under the indeterminate sentence law of 1903 the fixing by the court of a maximum term of imprisonment upon one convicted of a crime for which the maximum is prescribed by law, is a mere nullity, and the prisoner, by virtue of the statute, stands sentenced to the full maximum term prescribed by law as punishment for the crime.

In 1905 the Legislature re-enacted the indeterminate sentence law (Act 184, P. A. 1905). The constitutionality of this law and also of the indeterminate sentence law of 1903 was questioned in the case of—

In re Manaca, 146 Mich. 697.

Sentence in that case was imposed upon petitioner under the indeterminate sentence law of 1903, which was in force at the time the crime was committed. It was contended in that case that the indeterminate sentence law of 1903 was repealed by the indeterminate sentence law of 1905, and that

both laws were in violation of both the state and federal constitutions for several reasons, among them that the law of 1905 was an ex post facto law. All of the judges were agreed that the indeterminate sentence law of 1903 was constitutional, but a majority held that the constitutionality of the law of 1905 was not involved in that case; that the law of 1905 applied only to crimes committed after it became operative and the law of 1903 was only repealed to that extent; and that as the crime of which petitioner was convicted was committed while the indeterminate sentence law of 1903 was in force, and under which sentence was imposed, his rights and obligations throughout the term of his sentence must be determined by the provisions of the law of 1903.

In the case of—

People v. Cook, 147 Mich. 127,

the constitutionality of the indeterminate sentence law of 1905 was again assailed and the law held constitutional.

Plaintiff in error was convicted of crime committed while the indeterminate sentence law of 1903 was in force and sentence was imposed upon him under the provisions of that law. The maximum term of imprisonment prescribed by law as punishment for the offense of which he was convicted is five years. The trial court imposed sentence for the minimum term of one year and the maximum term of two years.

By the decisions of the Supreme Court of this state construing the indeterminate sentence laws, plaintiff in error is ..ed in this situation: His sentence is to be construed as a sentence for the minimum term of one year and the maximum term of five years. His rights and obligations throughout his term of imprisonment are to be determined by the provisions of the indeterminate sentence law of 1903, the law in force at the time the crime was committed, and under which he was committed to prison.

II.

Federal Questions.

(a). It is contended by counsel for petitioner that the indeterminate sentence law is in violation of the sixth and eighth amendments to the constitution of the United States. It is sufficient to say of this contention that it has been repeatedly held by this court that these amendments are restrictive of the powers of the federal government and not a restraint upon the states and have no application to state prosecutions for crimes against state laws.

Spies v. Ill., 123 U. S. 166.

(b). It is also contended by counsel for petitioner that the indeterminate sentence law is invalid because in violation of section one of the fourteenth amendment to the constitution for the reason that by said act and the sentence imposed thereunder, the privileges and immunities of plaintiff in error as a citizen of the United States are abridged and he is deprived of his liberty without due process of law and denied the equal protection of the law.

The scope of the fourteenth amendment as applied to the powers of the states in dealing with crime is set forth by Mr. Justice Fuller in

Caldwell v. Texas, 137 U. S. 692,

where he says:

> "By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of adminstration through courts of justice, is due process,

and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Bank of Columbia v. Okely, 4 Wheat. 235, 244. The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. Hurtado v. California, 110 U. S. 516, 535." (137 U. S. 697, 698.)

Leeper v. Texas, 139 U. S. 462, 467, 468.

Unless, therefore, the rights of plaintiff in error were determined by some other and different rule than that applied to other persons accused of crime; unless he is by the provisions of the indeterminate sentence law deprived of some right guaranteed him by the constitution and laws of this state, he has no grievance of which he is entitled to complain.

There is no claim that in his trial, conviction and sentence any different proceedings were had than are had in the case of other persons accused of crime. By the indeterminate sentence laws in question no change in the law is effected with reference to the apprehension, accusation or trial of a person accused of crime. Under these laws the accused is, as before, entitled to a speedy and public trial by a jury; to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process of obtaining witnesses in his favor and to have assistance of counsel for his defense, and is entitled to the protection of all other safeguards secured to him by the constitution. After his conviction the court imposes an indeterminate sentence, the sentence which the Legislature, by virtue

of its power to define crimes and to fix their punishment, has provided. Every person accused of crime committed while the indeterminate sentence law is in force is subject to punishment by an indeterminate sentence, and there is no discrimination whatever against any person whether resident or non-resident of the state, citizen or alien.

It thus appears that in the regular course of administration of the laws of this state, plaintiff in error was duly convicted of crime under the laws of the state. It is not claimed that in the proceedings which resulted in the commitment of plaintiff in error there was anything special, partial or arbitrary or in violation of fundamental principles. It is not claimed that his rights had been determined by any other rules than those applied to the rest of the community. It cannot, therefore, be said that there was any denial of the equal protection of the laws or of the process due by the law of the land.

(c). It is also contended by counsel for petitioner that the indeterminate sentence law under which plaintiff in error was sentenced (Act 136, P. A. 1903) was repealed by the indeterminate sentence law of 1905 (Act 184, P. A. 1905), and that the latter act is ex post facto for the reason that it inflicts greater punishment and requires and demands more of plaintiff in error and alters his situation to his disadvantage.

As hereinbefore shown, the Supreme Court of Michigan has expressly held that the indeterminate sentence law of 1905 did not repeal the indeterminate sentence law of 1903 as to crimes committed while the law of 1903 was in force; and that the rights of one sentenced under the indeterminate sentence law of 1903 were throughout the period of his sentence to be determined by that law.

In re Manaca, 146 Mich. 697.

Under this decision the indeterminate sentence law of 1905 has no application whatever to the plaintiff in error who was sentenced under the law of 1903, and no question as to whether or not the law of 1905 is ex post facto involved in this case.

III.

Other Questions.

The provision denying parole to one twice previously convicted of a felony, contained in section 4 of Act 136, Public Acts of 1903, providing "that no prisoner who has been twice previously convicted of a felony shall be eligible to parole under the provisions of this act," is contended by counsel for petitioner to be unconstitutional, for the reason that it is not within the title to the act which purports to provide only for indeterminate sentences.

It is only necessary to say, in answer to this contention, that this presents a question as to the validity of the act under the constitution of Michigan, which this court has no jurisdiction to determine.

> Revised Statutes, U. S., Sec. 709;
> Leeper v. Texas, 139 U. S. 462, 467.

The question of whether or not the indeterminate sentence laws confer judicial power upon the Governor, Board of Control, Advisory Board in the Matter of Pardons, or other officers or boards charged with their administration, is for the determination of the state courts and presents no federal question.

> Dreyer v. Ill., 187 U. S. 71.

IV.

Decisions affirming the constitutionality of Indeterminate Sentence Laws.

Indeterminate sentence laws similar to those enacted in this state have been enacted in many other states and have uniformly been held constitutional.

State v. Page, 60 Kan. 664;
State v. Peters, 43 O. St. 629;
Miller v. State, 149 Ind. 607;
People v. State Reformatory, 148 Ill. 413;
George v. People, 167 Ill. 447;
Commonwealth v. Brown, 167 Mass. 144;
People v. Warden of Sing Sing Prison, 78 N. Y. S. 507;
People v. Adams, 176 N. Y. 351.

In the above decisions all of the questions raised by counsel for plaintiff in error in this case have been determined, the courts holding that such indeterminate sentence acts confer ministerial and administrative and not judicial powers; that the pardoning power, as lodged by the constitution, is not disturbed; that the right to trial by jury is unimpaired; that the Legislature may empower penitentiary officials to make rules and regulations for the government and discipline of prisoners, even to the extent of empowering them to provide for the release of persons on parole; that the character and extent of the punishment are matters clearly within the exclusive control of the Legislature; that there is in fact no uncertainty in the sentence under such laws, the sentence in effect being for the maximum term; that it is the prerogative of the Legislature to fix all punishment for crime, except as limited by the constitutional provision against the imposition

of cruel and unusual punishments, and that no constitutional right of the prisoner is violated by such laws.

For these reasons it is respectfully submitted that the judgment of the Supreme Court of Michigan should be affirmed.

JOHN E. BIRD,
Attorney General of Michigan.

UGHBANKS *v.* ARMSTRONG, WARDEN OF THE MICHIGAN STATE PRISON.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 435. Submitted January 20, 1908.—Decided February 24, 1908.

The indeterminate sentence law of Michigan of 1903, as construed and sustained according to its own constitution, by the highest court of that State, does not violate any provision of the Federal Constitution. It is of a character similar to the Illinois act, sustained by this court in *Dreyer* v. *Illinois*, 187 U. S. 71.

When a subsequently enacted criminal law is more drastic than the existing law which in terms is repealed thereby, the claim that it is *ex post facto* as to one imprisoned under the former law and therefore void, and that the earlier law being repealed he cannot be held thereunder, has no force in this court where the state court has held that the later law does not repeal the earlier law as to those sentenced thereunder. In such a case this court follows the construction of the state court.

The Sixth and Eighth Amendments to the Federal Constitution do not limit the power of the State.

The Fourteenth Amendment to the Federal Constitution does not limit the power of the State in dealing with crime committed within its own borders or with the punishment thereof. But a State must not deprive particular persons or classes of persons of equal and impartial justice.

This court follows the construction of an indeterminate sentence law by the highest court of the State, to the effect that where the maximum term of imprisonment for a crime has been fixed by statute a maximum term fixed by the court of a shorter period is simply void.

The granting of favors by a State to criminals in its prisons is entirely a matter of policy to be determined by the legislature, which may attach thereto such conditions as it sees fit, and where it places the granting of such favors in the discretion of an executive officer it is not bound to give the convict applying therefor a hearing.

The provision in the indeterminate law of Michigan of 1903, excepting prisoners twice sentenced before from the privilege of parole, extended in the discretion of the Executive to prisoners after the expiration of

their minimum sentence, does not deprive convicts of the excepted class of their liberty without due process of law, or deny to them the equal protection of the laws.

THIS writ of error brings up a judgment of the Supreme Court of Michigan, denying the application of the plaintiff in error for a writ of *habeas corpus*, to inquire into the cause of his detention in, and to obtain his discharge from, the state prison at Jackson.

It appears from the record that on the seventeenth of March, 1904, the plaintiff in error was proceeded against in the Circuit Court for the county of Washtenaw, in the State of Michigan, on an information filed by the prosecuting attorney for that county, charging the plaintiff in error with having committed the crime of burglary on the fifteenth of March, 1904. Upon being arraigned upon such information he pleaded guilty and was, on the day mentioned, sentenced under the indeterminate sentence act of the State to be confined in the state prison at Jackson at hard labor for a period not less than one year and not more than two years. Public acts of Michigan, May 21, 1903, No. 136, p. 168. His term of imprisonment, counting the maximum period for which he was sentenced, ended, as he asserts, on March 17, 1906, even without any deduction for good behavior.

In his petition for the writ plaintiff in error stated that by the record kept and retained by the warden of the Michigan state prison at Jackson it appeared, as plaintiff in error was advised, that he had been twice before convicted of felony, and that he had served four years in Kingston, Canada, and four years in Jackson, Michigan, on account thereof, and that he was a resident of Canada and had never resided in the State of Michigan or in the United States.

He made application at the end of the minimum term of his sentence to the advisory board, provided for by § 4 of the above act, for his discharge on parole, but he was notified that his application could not be heard or considered for the reason

that it appeared that he had been twice before convicted of a felony, and the act provides that no person who has been twice previously convicted of a felony shall be eligible to parole.

After the expiration of the maximum term named in the sentence, being still detained in prison under the claim that the law provided a maximum term of imprisonment of five years in such a case as his, which term had not elapsed, the plaintiff in error applied to the Supreme Court of Michigan for a writ of *habeas corpus* to obtain his discharge, and upon the denial of the application brought the case here.

Mr. John B. Chaddock and *Mr. George E. Nichols* for plaintiff in error:

By the very language of the constitutional amendment and the resolution which preceded, it is evident that the legislature and the people must have intended to obtain power, through this amendment, to pass indeterminate sentence laws, as such laws are generally understood and accepted. The power of the legislature, therefore, was limited to the passage of such an indeterminate sentence law as was contemplated by the framers of the amendment.

It follows that any statute enacted under this constitutional amendment, which permits the imposition of any punishment, other than an indeterminate sentence, as contemplated thereby, is in violation of the constitutional amendment, and if it violates the provisions, or any of them, of the Federal Constitution, the acts are void, and all sentences pronounced under them are invalid, and the party restrained of his liberty thereby is entitled to his discharge, especially as in this case, if he has served his minimum sentence.

Both acts referred to not only authorize the imposition of a sentence, which in no sense of the word can be classed as indeterminate, but the machinery of the law for carrying the sentence into effect violates the state, as well as the Federal, Constitution, and deprives the citizen of his liberty without due process of law.

While the indeterminate sentence act says in terms that it shall apply to every sentence thereafter imposed, with only the two exceptions of persons sentenced for life, and children under fifteen years of age, yet it later provides that no prisoner who has been twice previously convicted of a felony shall be eligible to parole under the provisions of the act. See act 136, Public acts 1903, §§ 1, 4. Thus although plaintiff in error was sentenced as the law required under act 136, yet he cannot, if the charge against him be true, have any of its benefits or advantages.

If it is due process of law for the executive to determine and fix the period for which a person convicted of crime shall remain in prison, upon the conduct of the prisoner while in prison, and if such process meets the requirements of the punishment authorized by the constitutional amendment, providing for an indeterminate sentence, in one case, it does in all cases. The opportunity to earn release by good conduct is an essential feature of the indeterminate sentence amendment to the constitution. The power to limit and abridge this opportunity in either case implies the right to deny it entirely. To withhold in one case what has been granted as right in other and similar cases, is unjust and a grievous discrimination, contrary to § 1 of the Fourteenth Amendment. If all persons must be sentenced under the law, then it should apply equally to all. See *Easton* v. *State*, 11 Arkansas, 481.

The act of 1903 (act 136 of Public acts of 1903), under which plaintiff in error was sentenced, having been repealed by the act of 1905 (§ 17, act 184, Public acts of 1905), the only color of right which the warden now has to hold the plaintiff in error is under the act of 1905, and the latter act being *ex post facto* as to him, his detention is unlawful as in violation of the Constitution of the United States. The new act undoubtedly alters the situation of the prisoner to his detriment and so brings the case within the authorities. *Ex parte Medley*, 134 U. S. 164; *In the Matter of Canfield*, 98 Michigan, 644; *Murphy* v. *Com.*, 52 N. E. Rep. 505; *In re Murphy*, 87 Fed. Rep. 549;

Cring v. *State*, 107 U. S. 221; *State* v. *Tyree*, 77 Pac. Rep. 290.

Mr. John E. Bird, Attorney General of the State of Michigan, and *Mr. Henry E. Chase*, for defendant in error.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

An act providing for an indeterminate sentence was first passed in Michigan on July 1, 1889, No. 228, p. 337, and was declared unconstitutional by the Supreme Court of that State. *People* v. *Cummings*, 88 Michigan, 249. A constitutional amendment was subsequently adopted (1901), which authorized the legislature to provide for an indeterminate sentence law, as punishment for crime, on conviction thereof. Art. 4, § 47, constitution of Michigan, as amended. See Laws of 1903, p. 452. Under the authority of this amendment the legislature, in 1903, passed act No. 136 of the public acts of that year. This act was held to be valid. *In re Campbell*, 138 Michigan, 597; *In re Duff*, 141 Michigan, 623. An act of a character very similar has been held to violate no provision of the Federal Constitution. *Dreyer* v. *Illinois*, 187 U. S. 71. While the act in question here was in force the crime of plaintiff in error was committed, and on the seventeenth of March, 1904, he was sentenced as already stated. The sentence fixed the maximum as well as the minimum term of imprisonment, but the fixing of a maximum term in the sentence has been held to be void, as not intended or authorized by the law of 1903, in any case where the statute providing for the punishment of a crime itself fixes the maximum term of imprisonment at a certain number of years. *In re Campbell; In re Duff*, *supra*.

In this case, where the maximum term for burglary is fixed by the statute at five years, the sentence fixing that term at two years was simply void, and the maximum term of imprisonment fixed by the statute takes the place of the maximum term

fixed in the sentence. *In re Campbell; In re Duff, supra.* Under this construction the term of imprisonment of the plaintiff in error has not yet expired.

He cannot, however, avail himself of the provisions of the statute in relation to applying for and obtaining his discharge on parole, after the expiration of the minimum term of the sentence, because he has been convicted of two previous felonies.

On June 7, 1905, Public acts of Michigan, No. 184, p. 268, the legislature passed another act on the same subject and repealed the act of 1903. The plaintiff in error contends that the provisions of the act of 1905 are more unfavorable to him than those of the act of 1903, and that it is invalid as to him because it is an *ex post facto* law, and, as the act of 1903 has been repealed, there is no act in force by which he can be further imprisoned.

Without stopping to inquire whether the act of 1905 would be in his case an *ex post facto* law, it may be stated that the Supreme Court of Michigan has held that the act of 1903 is not repealed as to those who were sentenced under it, and that as to them it is in full force, and the statute of 1905 has no application. *In re Manaca*, 146 Michigan, 697. In such a case as this we follow that construction of the constitution and laws of the State which has been given them by the highest court thereof. There is, therefore, no force in the contention made on the part of the plaintiff in error that the act of 1905 applies in his case and is *ex post facto*.

It is also urged that the result of the holding of the state court is that plaintiff in error is imprisoned under the indeterminate sentence act of 1903 for the maximum period (five years) provided by the general statute for the crime of which he has been convicted, without any discretion on the part of the court as to the term of his sentence, while he is also refused the right to apply under the act for a discharge upon his parole after the expiration of the minimum term of the sentence, because, it is alleged, that as to him there can be no

minimum sentence, as he has been twice before convicted of a felony, although he has had no opportunity of being heard as to that allegation. He now urges that he is imprisoned in violation of the Sixth and Eighth and the Fourteenth Amendments of the Federal Constitution.

The claim rests upon an entire misapprehension of the rights of the plaintiff in error under these Amendments. The Sixth and Eighth Amendments do not limit the powers of the States, as has many times been decided. *Spies* v. *Illinois*, 123 U. S. 131; *Eilenbecker* v. *District Court &c.*, 134 U. S. 31; *Brown* v. *New Jersey*, 175 U. S. 172–174; *Maxwell* v. *Dow*, 176 U. S. 581, 586. The plaintiff in error says that under the Fourteenth Amendment he is imprisoned without due process of law and is denied the equal protection of the laws. The last-named Amendment was not intended to, and does not, limit the powers of a State in dealing with crime committed within its own borders or with the punishment thereof, although no State can deprive particular persons or classes of persons of equal and impartial justice under the law. *In re Kemmler*, 136 U. S. 436, 448; *Caldwell* v. *Texas*, 137 U. S. 692. The act in question provides for the granting of a favor to persons convicted of crime who are confined in a state prison. *People* v. *Cook*, 147 Michigan, 127–132. It gives to a criminal so confined, subsequent to the expiration of the minimum term of imprisonment stated in the sentence, the privilege to make application for parole to the warden or superintendent of the prison where he is confined, and the warden is directed to send such application to the governor. Upon its receipt the governor may order such investigation by the advisory board in the matter of pardons as he may deem advisable and necessary, but the authority to grant paroles, under such rules and regulations as the governor may adopt, is conferred by the statute exclusively upon that officer. He is not bound to grant a parole in any case, and § 4 provides "that no prisoner who has been twice previously convicted of a felony shall be eligible to parole under the provisions of this act." As the State is thus provid-

ing for the granting of a favor to a convicted criminal confined within one of its prisons, it may (unless under extraordinary circumstances) attach such conditions to the application for, or to the granting of, the favor as it may deem proper, or it may in its discretion exclude such classes of persons from participation in the favor as may to it seem fit. If the State choose to grant this privilege to make application to the governor for a discharge upon parole in the case of one class of criminals and deny it to others, such, for instance, as those who have been twice convicted of a felony, it is a question of state policy exclusively for the State to decide, as is also the procedure to ascertain the fact, as well as the kind or amount of evidence upon which to base its determination. It is not bound to give the convict a hearing upon the question of prior conviction, and a failure to give it violates no provision of the Federal Constitution. The application for parole is, in any event, addressed exclusively to the discretion of the governor. Even after the convict is at large by virtue of the parole granted, he is still deemed to be serving out the sentence imposed upon him, and he remains technically in the legal custody and under the control of the governor, "subject at any time to be taken back within the inclosure of the prison from which he was permitted to go at large, for any reason that shall be satisfactory to the governor, and at his sole discretion; and full power to retake and return any such paroled convict to the prison from which he was permitted to go at large is hereby expressly conferred upon the governor." Section 5, act of 1903, *supra*.

We find nothing in the record which shows any violation of the Federal Constitution, and the judgment of the Supreme Court of Michigan must, therefore, be

Affirmed.

MR. JUSTICE HARLAN dissents.